Supreme Court, U.S.
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No. 99-800

IN THE
Supreme Court of the United States

RAYMOND E. PAWLOWSKI,
Petitioner,

v.

NORTHEAST ILLINOIS REGIONAL
COMMUTER RAILROAD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Railway Labor Act create a statutory right for a railroad employee to have a union representative present when he is questioned by his employer during an initial, internal investigatory interview that may lead to the employee's discipline?

RULE 29.6 LISTING

Respondent Northeast Illinois Regional Commuter Railroad Corporation, d/b/a Metra, is a public corporation that is not itself owned by any individual members of the public and that has no parent companies, subsidiaries, or affiliates that are owned by any members of the public. Metra was created pursuant to Section 2.20 of the Illinois Regional Transportation Authority Act, as amended, 70 ILCS 3615/2.20, to operate commuter railroad facilities on behalf of the Commuter Rail Board of the Illinois Regional Transportation Authority.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Northeast Illinois Regional Commuter Railroad Corporation, d/b/a Metra ("Metra"), hereby opposes the petition for a writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

1. Metra is a common carrier by railroad and is subject to the terms and requirements of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq*. Complaint, para. 3; R. 1, para. 3. Police officers below the rank of captain

in Metra's Police Services Department are represented by the Railroad Special Agents & Police Officers Section, Allied Services Division/TCU (the "Union") (Complaint, para. 8; R. 1, para. 8), and the terms and conditions of their employment by Metra are prescribed in the collective bargaining agreement ("CBA") between Metra and the Union.

2. Pawlowski began work for Metra as a police officer on February 13, 1997. Complaint, para. 7; R. 1, para. 7. On July 25, 1997, during the initial probationary period of his employment, Pawlowski was summoned to a meeting at Metra regional headquarters concerning an alleged violation of Metra departmental regulations. Complaint, paras. 12, 13; R. 1, paras. 12, 13. Pawlowski requested the presence of his union representative at the meeting, which Metra denied. Complaint, para. 15; R. 1, para. 15. The Metra-Union CBA did not provide for probationary employees to be represented at such meetings. On July 28, 1997, Metra terminated Pawlowski's employment based on statements made by him during the July 25, 1997, interview. Complaint, para. 17; R. 1, para. 17.

Following Pawlowski's dismissal, the Union appealed his discharge through the internal appeals procedure at Metra, but Metra refused to reconsider the dismissal. Complaint, para. 18; R. 1, para. 18. On October 15, 1997, the Union informed Pawlowski that it had closed its files on the matter and that his dismissal would stand. Complaint, para. 19; R. 1, para. 19. Pawlowski did not seek to arbitrate Metra's decision to terminate his employment, as was his right under Section 3 of the RLA. 45 U.S.C. § 153. *See Czosek v. O'Mara,* 397 U.S. 25, 28 n.1 (1970); *Elgin, J. & E. Ry. v. Burley,* 325 U.S. 711, 734-41 (1945).

3. Instead, Pawlowski filed his Complaint against Metra in the district court on March 27, 1998,[1] alleging that Metra's failure to permit him to have a union representative present during the July 25, 1997, interview violated his rights under Sections 2 Second and 2 Third of the RLA, 45 U.S.C. § 152 Second, § 152 Third. R. 1.[2] Metra subsequently filed a Motion to Dismiss or, in the Alternative, for Judgment on the Pleadings. R. 10.

4. The district court granted Metra's motion and dismissed Pawlowski's claims for two reasons: First, the district court ruled that Pawlowski had failed to identify anything in either the language of the RLA or in RLA case law that granted a rail employee the statutory right to union representation at an initial company investigatory interview. *Pawlowski v. Northeast Illinois Regional Commuter R.R. Corp.*, 31 F. Supp. 2d 1051 (N.D. Ill. 1998); Pet. App. 15-19. After reviewing decisions from both the Seventh Circuit and this Court, the district court concluded, "The RLA does not prescribe disciplinary procedures for an initial hearing or otherwise interfere with a rail carrier's right to discipline its employees." 31 F. Supp. 2d at 1051; Pet. App. 16. Instead, the court ruled, "The procedure at an initial hearing is governed exclusively by the CBA between labor and management." 31 F. Supp. 2d at 1052; Pet. App. 18. Having concluded that any right Pawlowski may have had to union representation at the interview could have come only from the Metra-Union CBA, the district court dismissed Pawlowski's claims for a second reason: Insofar as Pawlowski was relying on contractual, rather than statutory, rights,

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[1] Pawlowski mistakenly lists this date as March 30, 1999. Petition at 7.

[2] In his response to Metra's motion to dismiss, Pawlowski alleged for the first time that Metra also had violated his rights under RLA § 2 Fourth, 45 U.S.C. § 152 Fourth, R. 16, at 3-4, 13.

the RLA mandates that his dispute with Metra (a "minor dispute" in RLA parlance) be resolved through arbitration before the National Railroad Adjustment Board ("NRAB")[3] under RLA § 3, 45 U.S.C. § 153. Accordingly, the district court concluded that it lacked jurisdiction to entertain any such CBA-based claim. 31 F. Supp. 2d at 1053; Pet. App. 18-19.

5. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the district court judgment. *Pawlowski v. Northeast Illinois Regional Commuter R.R. Corp.*, 186 F.3d 997 (7th Cir. 1999); Pet. App. 1-14. After reviewing case precedent from this Court and the other circuits, the Court of Appeals rejected Pawlowski's argument that RLA § 2 Second, 45 U.S.C. § 152 Second, entitled him to union representation "immediately upon being called into Metra headquarters for questioning". 186 F.3d at 1001; Pet. App. 8. As the Court of Appeals recognized.

> To accept [Pawlowski's argument] would essentially mandate a particular statutory procedure whenever an employee had a disagreement with the railroad. This runs counter to the long line of cases from this and other courts holding that the RLA does not alter an employer's ability to investigate, discipline or discharge a railroad employee, nor does it dictate any specific statutory procedures that must be followed at the company level.

186 F.3d at 1002; Pet. App. 8-9.

The Court of Appeals recognized that a rail carrier has a statutory obligation to meet and confer with union representatives to discuss employee grievances once they have arisen. 186 F.3d at 1002; Pet. App. 10. However,

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[3] Misnamed the National Adjustment Review Board by Pawlowski. Petition at 28.

the court refused to adopt Pawlowski's argument that this obligation required Metra to allow Pawlowski to have a union representative present when he was questioned by the railroad:

> In this case, however, Pawlowski had not invoked any grievance procedure prior to the July 25th questioning. He appears to confuse Metra's investigative interview with a § 152 Second conference when he argues that, because he was denied representation at the questioning, the rights conferred by statute were violated. Yet this puts the cart before the horse. Pawlowski's dispute arose out of the interview, the interview was not a hearing about his dispute. Thus whatever statutory right to representation he possessed had not yet been triggered, because he had not yet invoked the grievance procedures in the CBA. *See Kotakis v. Elgin, Joliet & Eastern Ry. Co.*, 520 F.2d 570, 575 (7th Cir. 1975) (contractual right to representation not triggered prior to plaintiff's invocation of formal grievance machinery under CBA).
>
> A dispute within the meaning of § 152 Second arose for Pawlowski only after Metra informed him that he was being terminated for having violated company rules and he filed a grievance (in the form of an appeal) with respect to that disciplinary action. As noted above, Pawlowski was represented by the Union in his attempt to have it reversed. But while the RLA guaranteed Pawlowski that much representation, it did not by itself entitle him to more. Because Pawlowski was afforded the opportunity to confer through his Union over the dispute which arose from the July 25th questioning, his statutory rights were not violated.

186 F.3d at 1003; Pet. App. 12-13; footnote omitted.

Finally, the Court of Appeals rejected Pawlowski's alternative arguments that RLA §§ 2 Third and 2 Fourth, 45

U.S.C. §§ 152 Third and 152 Fourth, entitled him to union representation at the carrier interview. As the Court of Appeals observed, "these provisions relate to railroad employees' right to select a collective bargaining representative (Third) and join a collective bargaining unit (Fourth) without interference from the employer. [Citation omitted.] Pawlowski has pointed to no authortiy suggesting that either section provides for the kind of representational rights he claims." 186 F.2d at 1001 n.3; Pet. App. 7 n.3.

ARGUMENT

In the 73-year history of the Railway Labor Act, no court has ruled that the statute entitles a rail employee to have a union representative present when he is questioned by his supervisors about a matter that may lead to the imposition of discipline. Rail employees may enjoy such a right as a matter of contract; collective bargaining agreements in the rail industry typically spell out in detail the procedures that rail carriers must follow in disciplining employees and the rights that employees enjoy in connection with such disciplinary processes.[4] Petitioner Raymond Pawlowski's claim that provisions in the RLA entitled him to the presence of a union representative when questioned by Metra is contrary to decisions from every court to have considered this question. This case does not present any question deserving of review by this Court.

1. It is well-settled that nothing in the RLA entitles an employee to union representation during an investigation by a rail carrier of possible employee misconduct. The federal courts (in decisions that Pawlowski fails even

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[4] As the Court of Appeals observed (186 F.3d at 1000-01; Pet. App. 6) and as Pawlowski acknowledges (Petition at 5), the Metra-Union CBA does not provide for Union participation at any stage in Metra's disciplinary proceedings with respect to police officers in their first year of employment.

to acknowledge in his Petition) have uniformly and consistently ruled that the RLA does not prescribe any procedures that must be followed during a rail employer's disciplinary proceedings. The only possible sources of such rights are the CBAs between the rail carrier and its employees' unions, not the RLA.

This Court recognized decades ago that no provisions in the RLA interfere with a rail carrier's right to discipline its employees. "They do not 'interfere with the normal exercise of the right of the carrier to select its employees or to discharge them.' " *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 559 (1937), quoting *Texas & New Orleans Ry. v. Brotherhood of Ry. & S. Clerks*, 281 U.S. 548, 571 (1930).

The Courts of Appeals have ruled repeatedly, in a variety of factual contexts, that nothing in the RLA prescribes the procedures that an employer must follow in disciplining its workers and that the sole source of employee rights in connection with carrier disciplinary decisions can only be the terms of the applicable collective bargaining agreements. *See Landers v. National Railroad Pass. Corp.*, 814 F.2d 41, 46-47 (1st Cir. 1987) ("[T]here is, as we have mentioned before, no such statutory guarantee [with respect to union representation] applicable to company-level proceedings. Where, as here, a collective bargaining agreement is in place, representation rights must be based upon . . . that pact"), *aff'd*, 485 U.S. 652 (1988); *United Steelworkers of America v. Union R.R.*, 648 F.2d 905, 911 (3d Cir. 1981) ("The procedures followed in an investigative hearing, including the representation to which an employee is entitled, are governed by the applicable collective bargaining agreement"); *Dorsey v. Chesapeake & Ohio Ry.*, 476 F.2d 243, 245 (4th Cir. 1973) (" 'The federal courts are not

the guarantor of any rights of either labor or management at the initial hearing, either by force of the Constitution or Railway Labor Act. . .' "); *Johnson v. Express One International, Inc.*, 944 F.2d 247, 252 (5th Cir. 1991) (employee has no right under RLA to have a coworker present during investigatory interview); *Broady v. Illinois Cent. R.R.*, 191 F.2d 73, 76 (7th Cir.) ("We can find no provision of the Railway Labor Act which gives to employees the right to a representative of their own choice at an investigation by company officials of a charge that the employee has violated company rules"), *cert. denied*, 342 U.S. 897 (1951); *Edwards v. St. Louis- San Francisco R.R.*, 361 F.2d 946, 953 (7th Cir. 1966) ("The provisions of the Railway Labor Act govern neither the procedure by which a carrier may discharge its employees nor the conduct of an investigation hearing on railroad property"); *Kulavic v. Chicago & Ill. Midland Ry.*, 1 F.3d 507, 515 (7th Cir. 1993) ("The RLA does not govern the procedures a railroad uses in its investigative hearing"); *Brooks v. Chicago, R.I. & P. R.R.*, 177 F.2d 385, 391 (8th Cir. 1949) ("The Railway Labor Act does not empower the courts to enforce against railroads any prescribed procedure for investigating and discharging its employees. . . ."); *Watts v. Union Pacific R.R.*, 796 F.2d 1240, 1245 (10th Cir. 1986) (RLA does not grant employee right to representation by an attorney at company disciplinary hearings). Pawlowski has cited no contrary authority.[5]

2. In an effort to bring this case within this Court's *certiorari* standards, Pawlowski erroneously suggests that

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[5] At page 26 of his Petition, Pawlowski cryptically refers to "a 62 year unbroken line of precedent" that he asserts supports his interpretation of the RLA, but nowhere in his Petition does he cite a single decision that can even arguably be described as inconsistent with that of the Court of Appeals below.

the Court of Appeals' decision is somehow inconsistent with "the apparent face" (Petition at 26) of this Court's decisions in *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), and *Landers v. National R.R. Passenger Corp.*, 485 U.S. 652 (1988). Petition 7-8, 13, 23-24, 25, 26. In truth, neither decision involved the question presented here. The issue before this Court in *Burley* was whether the RLA authorizes a rail union to settle or compromise an individual employee's grievance or gives the union the exclusive right to present such grievance to arbitration before the National Railroad Adjustment Board. *See* 325 U.S. at 712. The claims at issue in *Burley* did not arise out of rail carrier disciplinary decisions; they solely involved employee monetary claims for "penalty damages" based on alleged violations of the starting time provisions of the CBA. Nothing in *Burley* concerned whether a rail employee has a statutory right to union representation prior to the imposition of discipline.

Pawlowski suggests that in *Landers* this Court "appeared to conclude that the RLA should be read to afford an employee the right to representation at disciplinary hearings by majority union representatives." Petition at 8. What Pawlowski ignores, however, is that in *Landers* this Court did not even suggest that any provision in the RLA gives a rail employee a *statutory right* to a union representative at an internal disciplinary investigation (the sole question here). *Landers* concerned only whether any provision in the RLA (in particular Section 2 Eleventh—not Section 2 Second, as Pawlowski erroneously asserts in his Petition at 25) allows an employee to choose *which union* will represent him when the applicable CBA gives him a *contractual right* to union representation at such a hearing. 485 U.S. at 655. As this Court explained, the internal disciplinary hearing in question in *Landers* was "pursuant to the BLE-Amtrak collective-bargaining agree-

ment. . . . [T]he collective-bargaining agreement provided that only the BLE could represent engineers at company-level hearings." 485 U.S. at 654.

3. Pawlowski relies primarily on what he describes as the "apparent language" (Petition at 28) of RLA § 2 Second, 45 U.S.C. § 152 Second, in support of the right he claims. That section says nothing about a rail employee's rights in connection with carrier disciplinary proceedings, but simply states:

> All disputes between a carrier or carriers and its or their employees shall be considered, and if possible, decided, with all expedition in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

As Pawlowski notes, Section 2 Second indisputably refers to "all disputes." Petition at 19. What Pawlowski ignores, however, is that the term "dispute" has a well-settled meaning under the RLA: "disputes" refers to "major disputes" (over the formation of CBAs) and "minor disputes" (over the meaning or application of an existing CBA). *Burley*, 325 U.S. at 729.

Section 2 Second announces the general obligation of rail carriers and the representatives of their employees to confer with each other in an attempt to resolve both major and minor disputes. As the First Circuit explained in *Landers*, 814 F.2d at 44:

> Section 152, Second, spells out the overall duties of carriers, employees, and labor unions. It comprises a broadly general reference to the many kinds of controversies that might arise, not to specific procedures or to particular rights in dispute resolution proceedings between parties.

The specific procedures to be followed in the resolution of major and minor disputes are prescribed elsewhere in the RLA, not in Section 2 Second. *Burley*, 325 U.S. at 725, 727; *General Comm. of Adjustment v. Missouri-Kan.-Tex. R.R.*, 320 U.S. 323, 334 (1943).

The RLA deals specifically with a carrier's obligations in connection with the resolution of minor disputes in Section 2 Sixth, 45 U.S.C. § 152 Sixth:

> In case of a dispute between a carrier and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer with respect to such dispute, to specify a time and place at which such conference shall be held. . . .

and in Section 3 First (i), 45 U.S.C. § 153 First (i):

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

As the plain language of the statute establishes, the RLA imposes an obligation on a rail employer to confer with union representatives concerning a minor dispute

only once an employee or union representative has filed a grievance. Upon receipt of such a grievance, the carrier has 10 days in which to specify a time and place for a conference. RLA § 2 Sixth, 45 U.S.C. § 152 Sixth. It is at that point that the carrier is obligated to handle the grievance "in the usual manner" established on that rail carrier's property. RLA § 3 First (i), 45 U.S.C. § 153 First (i). Accordingly, it is only when an employee has filed a grievance concerning conduct of his rail carrier-employer that a minor dispute arises within the meaning of the RLA and the rail carrier is obligated, by RLA § 2 Sixth, § 3 First (i), and § 2 Second, to attempt to resolve the dispute through conferences with the employee's representatives. Nothing in the RLA obligates a rail employer to involve a union representative at an earlier stage of its disciplinary procedures.[6]

Nothing in the language of RLA § 2 Second obligates a carrier to allow an employee to be represented during the carrier's internal investigation of possible employee misconduct because no "dispute" arises—as that term is used in the RLA—until the employer has engaged in conduct allegedly violative of the employee's contractual rights. In the case of employer disciplinary proceedings, a "dispute" can arise only after the employer actually imposes discipline on the employee. As the Court of Appeals correctly ruled below, the "dispute" is created when the employee files a grievance or appeal challenging such discipline. 186 F.3d at 1003; App. 12-13. *See also Broady*, 191 F.2d at 77.

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[6] Of course, many rail industry CBAs (including the Metra-Union CBA, with respect to police employees with at least one year of seniority) specify that a rail carrier cannot discipline an employee without first conducting a formal hearing at which the employee has the right to be represented by a union official. But any such right to representation has solely a *contractual*, not a *statutory*, origin.

Accordingly, a "dispute" within the meaning of RLA § 2 Second, 45 U.S.C. § 152 Second, arose with respect to Metra's treatment of Pawlowski only after Metra informed him that he was being discharged for misconduct and Pawlowski and the Union filed a grievance (an appeal) with respect to that disciplinary decision. At that point, Metra had a statutory obligation to meet and confer with the Union, as Pawlowski's representative, to try to resolve the "dispute" over his dismissal. As Pawlowski admits in his Complaint, para. 18, (R. 1, para. 18), Metra fulfilled this statutory obligation when it considered (but ultimately denied) the Union's appeal. No court has ruled that a rail employer's decision to summon an employee to an internal investigatory interview automatically creates—or that the interview itself somehow constitutes—a "dispute" within the meaning of Section 2 Second such that the employer must somehow "confer" with the employee's union representative by allowing the representative to be present during the interview.[7]

4. Neither RLA § 2 Third nor § 2 Fourth advances Pawlowski's argument. Second 2 Third, 45 U.S.C. § 152 Third ("Designation of representatives"), merely prohibits carrier interference in the selection of a union by employees; it says nothing concerning an employee's right to

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[7] While Section 2 Second, by its terms, obligates a carrier actively to "confer" with its employees' representative once a "dispute" has arisen, Pawlowski recognizes that requiring this active level of union involvement during the course of a disciplinary investigation would "interfere with the normal exercise of the right of the carrier . . . to discharge [its employees]", an interpretation of the RLA prescribed by this Court in *Virginian Ry.* and *Texas & New Orleans Ry., supra.* Accordingly, he suggests in his Petition that the union representative would simply be present during the carrier's investigation as a silent "observer" or a "monitor". Petition at 18, 22. Nothing in Section 2 Second supports the strained interpretation that would require the recognition of such variable levels of union involvement.

have a union representative present during a disciplinary interview. *See Landers,* 814 F.2d at 44 (Section 2 Third "was intended to prohibit meddling by an employer with the majority's choice of a collective bargaining representative," not to grant employees a right to representation during carrier disciplinary investigations). Section 2 Fourth, 45 U.S.C. § 152 Fourth ("Organization and collective bargaining, freedom from interference by carrier, assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden"), is equally inapposite. Pawlowski makes no claim that Metra has interfered in any way with the selection of the Union as the exclusive collective bargaining representative of Metra police officers or that Metra has refused to engage in collective bargaining with the Union concerning the terms and conditions of their employment.

Nor does the proviso to Section 2 Fourth ("That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time") establish the right Pawlowski asserts. As this Court explained in *Burley,* 325 U.S. at 735, this language simply was intended to preserve the fundamental right of an individual employee "to confer with the management about his own grievance." Pawlowski makes no claim that Metra refused to confer with him—and would speak only with the Union—concerning his grievance/appeal from his dismissal. Nothing in these sections even remotely speaks to the question presented here: whether the RLA obligated Metra to allow Pawlowski to be accompanied by a union representative during the carrier's internal investigation of Pawlowski's misconduct.[8]

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[8] In contrast, employees covered by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, have been held to enjoy a

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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statutory right to union representation during employer questioning that could lead to disciplinary action because of the specific language included by Congress in NLRA § 7, 29 U.S.C. § 157 ("Employees shall have the right . . . to engage in other concerted activities for the purpose of . . . other mutual aid or protection. . ."). *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260-62 (1975). There is no comparable statutory right under the RLA because there is no comparable statutory provision. *See Johnson*, 944 F.2d at 251.